

1999

## Recent Developments in Aviation Law

Hugh R. Koss

Michael L. Rodenbaugh

Eric C. Strain

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### Recommended Citation

Hugh R. Koss et al., *Recent Developments in Aviation Law*, 65 J. AIR L. & COM. 3 (1999)  
<https://scholar.smu.edu/jalc/vol65/iss1/3>

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## RECENT DEVELOPMENTS IN AVIATION LAW

HUGH R. KOSS  
MICHAEL L. RODENBAUGH  
ERIC C. STRAIN\*

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\* Hugh Koss is a partner in the firm of Lillick & Charles, LLP, and resident in their San Francisco office. Michael Rodenbaugh and Eric Strain are associates in that office. Messrs. Koss and Rodenbaugh are members of Lillick's Aviation and Product Liability Practice Group. The authors thank the Symposium Board and the staff at the Journal for the honor of presenting this paper.

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## I. INTRODUCTION

**D**RAWING ON our own experience in using this article as an updated practical reference, and on the legal reality that trial court precedent truly is not, we present below seminal appellate authorities from the aviation arena from 1998. We also present non-aviation appellate authorities having industry application, and in footnotes give parenthetical treatment to trial court aviation decisions of particular interest. We certainly do not (and could not) cover the entire realm of "aviation law," and much less the realm of law affecting aviation. We apologize for any decisions omitted for editorial or other reasons. We hope what is offered is helpful to the practitioner.

## II. GENERAL ISSUES

## A. SUBJECT MATTER JURISDICTION

1. *Foreign Sovereign Immunities Act*

The Second Circuit in *Hanil Bank v. PT. Bank Negara Indonesia*<sup>1</sup> addressed the scope of the “commercial activity” exception to Foreign Sovereign Immunities Act (FSIA)<sup>2</sup> jurisdictional immunity. In this factually similar case to *Republic of Argentina v. Weltover, Inc.*,<sup>3</sup> the court held that the defendant bank’s actions in Indonesia in failing to pay on a letter of credit caused a “direct effect” in the United States for purposes of the “commercial activity” exception, 28 U.S.C. § 1605(a)(2), such that the bank was subject to the jurisdiction of the Southern District of New York.<sup>4</sup> The plaintiff bank had been “entitled under the letter of credit to indicate how it would be reimbursed, and it [had] designated payment to its bank account in New York.”<sup>5</sup>

In a second antitrust case, *Filetech S.A. v. France Telecom S.A.*,<sup>6</sup> the court reaffirmed that it recognizes a “legally significant acts” test for determining whether there has been a “direct effect” in the United States within the meaning of the 28 U.S.C. § 1605(a)(2) “commercial activity” exception to immunity.<sup>7</sup> This test requires that the conduct assertedly causing a “direct effect” in the United States be “legally significant” to the claim in order for the exception to apply.<sup>8</sup> The court also held that the district court had not properly resolved the jurisdictional question under the FSIA, finding that factual disputes existed as to the defendant’s “commercial activity” in the U.S. and abroad as they related to the claim and therefore the district court had erred in accepting the allegations in the complaint as a basis for finding jurisdiction: “In these circumstances, the [district] court should have looked outside the pleadings to the [parties’] submissions, which both contradicted and supported the bare allegations of jurisdiction pleaded in the complaint.”<sup>9</sup> The court also noted that the district court could have held an evidentiary

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<sup>1</sup> 148 F.3d 127 (2d Cir. 1998).

<sup>2</sup> 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1994).

<sup>3</sup> 504 U.S. 607 (1992).

<sup>4</sup> See *Hanil Bank*, 148 F.3d at 131-32.

<sup>5</sup> *Id.* at 132.

<sup>6</sup> 157 F.3d 922 (2d Cir. 1998).

<sup>7</sup> *Id.* at 931.

<sup>8</sup> See *id.* (citing *Hanil Bank*, 148 F.3d at 133).

<sup>9</sup> *Id.* at 932.

hearing to ascertain the facts of jurisdiction had it found one warranted.<sup>10</sup>

In a case similar to *Hanil Bank*, the Fifth Circuit held in *Voest-Alpine Trading USA Corp. v. Bank of China*<sup>11</sup> that the Bank of China's failure to remit funds to a domestic seller's designated bank account in the United States caused a "direct effect" in the United States, and thus the district court in Texas had jurisdiction over the seller's action pursuant to the "commercial activity" exception.<sup>12</sup> However, the court specifically rejected the Second Circuit's "legally significant acts" test,<sup>13</sup> finding that nothing in the language of 28 U.S.C. § 1605 required that a threshold "legally significant acts" element be proven.<sup>14</sup>

In *Peré v. Nuovo Pignone, Inc.*,<sup>15</sup> the court held that an Italian "foreign state" manufacturer of a turbine designed and manufactured in Italy that exploded off the coast of Angola, killing plaintiff's decedent, was immune from U.S. jurisdiction under the FSIA because none of the 28 U.S.C. § 1605(a)(2) exceptions applied.<sup>16</sup> The court specifically found that the second prong of Section 1605(a)(2) did not apply because activities alleged to have been engaged in by the defendant in the United States were not connected to its design and manufacture of the turbine, which was the basis of the alleged cause of action.<sup>17</sup> The court also found no waiver of the defendant's right to assert sovereign immunity based on a clause in a contract that provided for the application of Texas law.<sup>18</sup> The court noted that such implied waivers have been found only where a contract is between the parties suing and being sued,<sup>19</sup> and that contractual

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<sup>10</sup> See *id.*

<sup>11</sup> 142 F.3d 887 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 591 (1998).

<sup>12</sup> *Id.* at 891-897.

<sup>13</sup> See *id.* at 894-95 (citing decisions from the Eighth, Ninth, and Tenth Circuits).

<sup>14</sup> See *id.* at 895. Cf. *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-57 (1993) (citing the statute and requiring that the acts supporting a "commercial activity" exception to immunity be those which the alleged cause of action are "based upon").

<sup>15</sup> 150 F.3d 477 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1033 (1999).

<sup>16</sup> *Id.* at 479-81.

<sup>17</sup> See *id.* at 481 (holding that "foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign [state] status before suit is filed," and that the time of the defendant's actions which are the basis of the suit control whether it is treated as a "foreign state" under the FSIA).

<sup>18</sup> See *id.* at 482.

<sup>19</sup> See *id.* (citing *Eckert Int'l v. The Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79-82 (4th Cir. 1994), *Joseph v. Office of Consulate Gen. of*

choice of law provisions do not *ipso facto* constitute an implicit waiver of immunity under the FSIA.<sup>20</sup>

In *Theo. H. Davies & Co. v. Republic of the Marshall Islands*,<sup>21</sup> the court reversed a district court judgment, holding instead that under the FSIA, entities comprising a foreign state's water and power utility lost their immunity from suit by virtue of repeated purchases of generating equipment from a United States vendor.<sup>22</sup> The court found that the "foreign state" defendants had for many years bought both goods and services from providers doing business or located in the United States and had solicited bids for the work at issue in Hawaii.<sup>23</sup> Agreements related to the dispute, the alleged failure of a generator, were also negotiated in Guam with meetings held in Hawaii.<sup>24</sup> In finding exceptions to immunity, the Ninth Circuit agreed that "'doing business' . . . can properly be used as a jurisdictional ground."<sup>25</sup> Quoting Judge Patrick Higginbotham of the Fifth Circuit, the court agreed:

[t]he FSIA's 'substantial contact' language . . . does not signal a congressional intent to enact more stringent a test than the 'minimum contacts' necessary for 'doing business' jurisdiction . . . . General personal jurisdiction over a foreign entity that engages in substantial commercial activity in the United States is authorized by the first clause of 28 U.S.C. § 1605(a)(2).<sup>26</sup>

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Nigeria, 830 F.2d 1018, 1022-23 (9th Cir. 1987), and *Kramer v. Boeing Co.*, 705 F. Supp. 1392, 1394-95 (D. Minn. 1989)).

<sup>20</sup> See *id.*

<sup>21</sup> 174 F.3d 969 (9th Cir. 1998).

<sup>22</sup> *Id.* at 975-76.

<sup>23</sup> See *id.* at 974-75.

<sup>24</sup> See *id.* at 975.

<sup>25</sup> *Id.* at 976.

<sup>26</sup> *Id.* (citing *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 206 (5th Cir. 1984)). See also *Ahmed v. United Airlines, Inc.*, No. C 97-4666 CW, 1998 WL 289294, at \*1, 5 (N.D. Cal. Apr. 21, 1998) (dismissing action against a foreign air carrier wholly owned by several Middle Eastern states for lack of subject matter jurisdiction under the FSIA because the conduct complained of (the failure to warn of the need for a visa) occurred abroad and plaintiff could show no "direct effect" in the United States); *Nazarian v. Compagnie Nationale Air France*, 989 F. Supp. 504, 507-10 (S.D.N.Y. 1998) (holding that passenger claims against airline for false imprisonment, false arrest, intentional infliction of emotional distress, and breach of express promise of hotel accommodations were not "based upon" the airline's "commercial activity" in United States within meaning of the FSIA "commercial activity" exception; also holding that negligence claim regarding airline's operation of its flight schedule was "based upon" airline's "commercial activity" in the United States, but was nevertheless preempted by the ADA). Cf. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 327-28, 330 (E.D.N.Y. 1998),

## 2. Removal of Cases

In *Feidt v. Owens Corning Fiberglas Corp.*,<sup>27</sup> the court dismissed an appeal taken from a remand order issued pursuant to 28 U.S.C. § 1447(c) for lack of appellate jurisdiction.<sup>28</sup> While the court held that it did not have jurisdiction over the appeal due to 28 U.S.C. § 1447(d), it also discussed the “government contractor” defense as applied in the removal context.<sup>29</sup> The court stated that while the defendant had made a colorable claim as to the application of the defense, it failed to establish the necessary causal nexus between the conduct upon which the plaintiff’s claim of state law liability was based, an alleged failure to warn concerning the dangers of exposure to an asbestos product, and the conduct the defendant “allegedly performed under federal direction” (a federal military contract obligation).<sup>30</sup> The court also rejected the defendant’s argument that because the district court had based its remand analysis on a “policy considerations,” section 1447(d)’s bar to review should not apply.<sup>31</sup>

In *Winters v. Diamond Shamrock Chemical Co.*,<sup>32</sup> the court affirmed a summary judgment granted in favor of defendant Agent Orange manufacturers on statute of limitations grounds.<sup>33</sup> In affirming the lower court’s ruling, the Fifth Circuit also found that the defendant manufacturers had been entitled to remove the action under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a), as the companies were “persons” within the meaning of the statute, they had acted pursuant to a federal officer’s direction in manufacturing Agent Orange, and a causal nexus existed between such federal officer’s direction and the product liability claims being asserted.<sup>34</sup> The court

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*aff’d in part, dismissed in part*, 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2337 (1998) (holding that state sponsored terrorism exception to FSIA immunity is not unconstitutional, nor was designation of state as sponsor of terrorism for purposes of the Act; also finding personal jurisdiction over a foreign state, its external security organization, and its national airline in connection with the alleged terrorist bombing of Pan Am Flight 103).

<sup>27</sup> 153 F.3d 124 (3d Cir. 1998).

<sup>28</sup> *Id.* at 129-30.

<sup>29</sup> *See id.* at 126-27.

<sup>30</sup> *See id.* at 127.

<sup>31</sup> *See id.* at 128-29 (noting that the district court’s “policy considerations” analysis was an alternative basis for remand, and therefore not necessary to its holding).

<sup>32</sup> 149 F.3d 387 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1286 (1999).

<sup>33</sup> *Id.* at 390, 404.

<sup>34</sup> *See id.* at 398-400.

noted that the Supreme Court has stated that "one of the most important functions" of the right to remove under the Federal Officer Removal Statute "is to allow a federal court to determine the validity of an asserted official immunity defense."<sup>35</sup>

## B. PERSONAL JURISDICTION

In *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,<sup>36</sup> the court held that the Pennsylvania district court had no jurisdiction to enjoin a Louisiana court from proceeding in a similar case because the contemplated injunction would affect a nationwide group of some 5.7 million people who had settled claims with GM through the Louisiana proceeding and require the district court to exercise personal jurisdiction over them:

To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far as has been demonstrated, have minimum contacts with Pennsylvania. Therefore, due process deprives us of personal jurisdiction and prevents us from issuing the injunction prayed for by appellants.<sup>37</sup>

In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*,<sup>38</sup> the court held that the district court had not abused its discretion in dismissing a foreign radio station owner's antitrust action against a competitor for lack of personal jurisdiction without allowing the owner to conduct jurisdictional discovery.<sup>39</sup> The court relied on the fact that the plaintiff had failed to dispute the defendant's affidavit that it neither solicited business in the jurisdiction, nor made telephone calls to the jurisdiction:

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<sup>35</sup> *Id.*, at 397 (citing *Willingham v. Morgan*, 395 U.S. 402, 407 (1969) and *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981)). *Cf.* *Carroll v. United Air Lines, Inc.*, 7 F. Supp. 2d 516, 522 (D.N.J. 1998) (holding defendant airline's diversity removal of a personal injury case untimely because, although the complaint did not allege \$75,000 in damages, allegations of serious injuries and "wilful misconduct" under the Warsaw Convention (so as to breach the Convention's \$75,000 liability limitation) triggered removal period); *Godner-Abravanel v. American Airlines*, No. C 98-1772 SI, 1998 WL 456273, at \*1-2 (N.D. Cal. July 27, 1998) (remanding to state court where airline had sought to strike plaintiff's punitive damages claim prior to removal).

<sup>36</sup> 134 F.3d 133 (3d Cir. 1998).

<sup>37</sup> *Id.* at 141.

<sup>38</sup> 148 F.3d 1080 (D.C. Cir. 1998).

<sup>39</sup> *Id.* at 1089-91.



Because there was no indication before the court that CCC had any contacts at all with the District of Columbia, let alone the minimum contacts necessary for the court, consonant with due process, to exercise personal jurisdiction over it, CCC argues that any discovery would have been inappropriate . . . . As CCC rejoins, however, in order to get jurisdictional discovery a plaintiff must have at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant.<sup>40</sup>

In *Vandelune v. 4B Elevator Components Unlimited*,<sup>41</sup> the court found that the foreign manufacturer of a grain elevator safety device had sufficient contacts with the State of Iowa to permit the exercise of personal jurisdiction over it in a product liability action brought by a worker injured in a grain dust explosion.<sup>42</sup> The manufacturer had designed the device at issue for United States markets, had agreed to distribute the device through a distributor located near the Iowa border, and had sold 619 of the safety devices to the distributor, eighty-one of which were sold in Iowa.<sup>43</sup> Under these circumstances, the court held that the defendant had purposely directed its activities at residents of the forum, and that claims resulting from alleged injuries which arose out of those activities were properly litigated in Iowa.<sup>44</sup> The court also held that when a district court has resolved a personal jurisdiction issue without an evidentiary hearing, the court of appeals reviews *de novo* whether the plaintiff has made a *prima facie* showing of jurisdiction, viewing the facts in a light most favorable to it.<sup>45</sup>

In *Pennzoil Products Co. v. Colelli & Associates*,<sup>46</sup> the court held that the standard of review for factual findings made by the district court pertaining to personal jurisdiction is "clear error."<sup>47</sup> The court also held that under Pennsylvania's long-arm statute, which permits the exercise of jurisdiction over non-residents to the constitutional limits of the Due Process Clause of the Fourteenth Amendment, the district court had jurisdiction over an

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<sup>40</sup> *Id.* at 1089-90 (citing several decisions).

<sup>41</sup> 148 F.3d 943 (8th Cir. 1998), *cert. denied sub nom.*, 119 S. Ct. 543 (1998).

<sup>42</sup> *See id.* at 945, 947-48.

<sup>43</sup> *See id.* at 948.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* at 948 (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir. 1991)).

<sup>46</sup> 149 F.3d 197 (3d Cir. 1998).

<sup>47</sup> *Id.* at 200 (citing *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1220 (3d Cir. 1992)).

Ohio producer of solvents used by oil producers in that state, which then sold their crude containing the solvent to a Pennsylvania refinery allegedly causing injury in that state.<sup>48</sup>

### C. FORUM NON CONVENIENS

In *Gschwind v. Cessna Aircraft Co.*,<sup>49</sup> the Tenth Circuit affirmed the dismissal on *forum non conveniens* grounds of an action arising from an airplane crash in France that killed a French citizen.<sup>50</sup> Supporting its affirmance, the court agreed with the district court that French law would apply to the action, that the French court system would provide adequate procedures and an adequate remedy, and that the “private interest” factors weighed in favor of a French forum because most of the evidence relevant to the defendant’s claims of contributory negligence (i.e., that the pilot may have committed suicide) was more readily available in France.<sup>51</sup> The district court had also imposed conditions on the dismissal to ensure access to evidence in France and to at least partially ameliorate limitations concerns.<sup>52</sup>

In *Gemini Capital Group, Inc. v. Yap Fishing Corp.*,<sup>53</sup> the court affirmed the dismissal of a tuna industry business dispute action against a “foreign state” on grounds of *forum non conveniens* in favor of litigation in the courts of the State of Yap, Federated States of Micronesia.<sup>54</sup> In so affirming, the Ninth Circuit held that the district court had not erred in according the plaintiffs’ choice of forum less deference than that accorded a Hawaiian resident suing in his or her home state, nor did the district court

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<sup>48</sup> See *id.* at 203-08 (analyzing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) and the Supreme Court’s discussion of the “stream-of-commerce” theory, as well as post-*Asahi* decisions addressing the issue); see also *Raytheon Aircraft Credit Corp. v. Starship Enterprises, Inc.*, No. 97-1226-WEB, 1998 WL 166582, at \*1-2, 4 (D. Kan. Mar. 20, 1998) (denying a motion to dismiss for lack of personal jurisdiction because the defendant’s action “in accepting delivery of the aircraft in Kansas and ferrying it to Nevada qualif[ied] as transacting business within [Kansas]”); *Trans Nat’l Travel, Inc. v. Sun Pacific Int’l, Inc.*, 10 F. Supp. 2d 79, 81-83 (D. Mass. 1998) (denying motion to dismiss for lack of personal jurisdiction and for improper venue, holding that the actions of an Arizona air carrier that negotiated a contract with a Massachusetts corporation and provided services in Massachusetts constituted “sufficient minimum contacts” with Massachusetts).

<sup>49</sup> 161 F.3d 602 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1755 (1999).

<sup>50</sup> *Id.* at 604.

<sup>51</sup> See *id.* at 609-10.

<sup>52</sup> See *id.* at 605.

<sup>53</sup> 150 F.3d 1088 (9th Cir. 1998).

<sup>54</sup> See *id.* at 1090-95.

err in refusing to accord plaintiffs' choice heightened deference because the alternative forum was a foreign one.<sup>55</sup> The court also found that the district court had not erred in concluding that the plaintiffs had failed to show that they would be treated unfairly by either the Yap or Micronesian courts.<sup>56</sup>

#### D. MULTIDISTRICT LITIGATION

In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*,<sup>57</sup> the Supreme Court held that a district court to which cases have been transferred pursuant to 28 U.S.C. § 1407 for pretrial proceedings cannot, after conclusion of those proceedings, transfer the case to itself for trial under 28 U.S.C. § 1404(a).<sup>58</sup> The Court thus ended the patchwork of decisions "self-transferring" cases for trial or refusing to do so. In a fairly straightforward analysis, the Court relied primarily on the language of the multidistrict statute itself, which unequivocally mandates that actions transferred under it "shall be remanded by the [multidistrict litigation] panel at or before the conclusion of . . . pretrial proceedings."<sup>59</sup> The Court reasoned that "no exercise in rulemaking can read that obligation out of the statute."<sup>60</sup> The Court did not, however, address the separate issue of the

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<sup>55</sup> See *id.* at 1091-92 (discussing *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 (1981)).

<sup>56</sup> See *id.* at 1092-93; see also *Potomac Capital Investment Corp. v. KLM N.V.*, No. 97 Civ. 8141 (AJP) (RLC), 1998 WL 92416, \*1 (S.D.N.Y. Mar. 4, 1998) (dismissing negligent repair of aircraft engine action for *forum non conveniens* where repair occurred in the Netherlands and the engine failed over navigable waters while the airplane was flying from Senegal to Brazil). Cf. *Aero Sys. Eng'g, Inc. v. Opron, Inc.*, 21 F. Supp. 2d 990, 993-94, 998 (D. Minn. 1998) (denying motion to dismiss for lack of personal jurisdiction and *forum non conveniens*, and holding that a Quebec defendant negotiated a contract and corresponded with a Minnesota plaintiff and thus "actively nurtured and fostered a continuous business relationship" with the plaintiff through activities conducted in Minnesota); *United Air Lines, Inc. v. Mesa Airlines, Inc.*, 8 F. Supp. 2d 796, 797-800 (N.D. Ill. 1998) (denying defendant's motion to transfer venue to California and instead deferring to United's choice of a Chicago forum in a dispute against one of its "United Express" carriers); *United States ex rel. Roby v. Boeing Co.*, No. C-1-95-375, 1998 WL 54976, at \*1-3 (S.D. Ohio Jan. 21, 1998) (denying Boeing's motion to transfer venue to Pennsylvania where its helicopter manufacturing facilities were located, and holding that a whistleblower's False Claims Act suit should stay where it had been pending for two years, a district which also had contacts relevant to the action).

<sup>57</sup> 118 S. Ct. 956 (1998).

<sup>58</sup> *Id.* at 959.

<sup>59</sup> *Id.* at 962 (quoting 28 U.S.C. § 1407(a)).

<sup>60</sup> *Id.* at 963.

propriety of a 28 U.S.C. § 1404(a) transfer subsequent to remand by the Judicial Panel.

Following *Lexecon*, the Second Circuit in *Shah v. Pan American World Services, Inc.*,<sup>61</sup> held that the Supreme Court's rationale should apply equally to district court "self-transfers" under 28 U.S.C. § 157(b)(5), a bankruptcy venue statute.<sup>62</sup> In *Shah*, the court considered whether a judgment entered against plaintiff airline passengers and passenger survivors should be vacated under *Lexecon*, in light of the multidistrict transferee court's "self-transfer" of the matter following pretrial proceedings.<sup>63</sup> While the record showed the district court's "self-transfer" had been made under 28 U.S.C. § 1404(a),<sup>64</sup> the defendants argued that transfer had actually been effectuated pursuant to 28 U.S.C. § 157(b)(5) which they claimed allowed "self-transfer."<sup>65</sup> Noting that the Supreme Court's decision in *Lexecon* was not premised upon whether § 1404(a) alone allowed for "self-transfer," the Second Circuit reasoned that the requirement of remand by the Judicial Panel was made necessary by 28 U.S.C. § 1407 irrespective of a district court's power to transfer under § 157(b)(5) or any other venue provision.<sup>66</sup> The Second Circuit went on to hold, however, that *Lexecon* should not be applied retroactively to the case, denying plaintiffs relief.<sup>67</sup>

### E. CHOICE OF LAW

In *Curley v. AMR Corp.*,<sup>68</sup> a passenger sued an airline and its employees for negligence, gross negligence and false imprison-

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<sup>61</sup> 148 F.3d 84 (2d Cir. 1998), *cert. denied sub. nom.*, 119 S. Ct. 1033 (1999), *cert. denied sub. nom.*, 119 S. Ct. 1034 (1999).

<sup>62</sup> *Id.* at 90-91.

<sup>63</sup> *See id.* at 88-89.

<sup>64</sup> While this arguably renders the *Shah* discussion of *Lexecon*, as applied to transfer under 28 U.S.C. § 157(b)(5), dicta, the court's analysis is well-reasoned in light of the plain language of the multidistrict transfer statute.

<sup>65</sup> *See Shah*, 148 F.3d at 90-91.

<sup>66</sup> *See id.* at 91.

In short, *Lexecon* and § 1407 require that the MDL panel remand to the transferor court any action 'at or before the conclusion of . . . pretrial proceedings,' and any further transfers of venue for trial under any statute must follow such remand. Whether, *after* remand to the transferor court, a court has the power to transfer venue to itself under § 1404(a) or § 157(b)(5) is a separate issue that we have no need to decide.

*Id.*

<sup>67</sup> *See id.* at 91-92.

<sup>68</sup> 153 F.3d 5 (2d Cir. 1998).

ment, alleging that he was detained and searched by Mexican authorities after being falsely identified as having smoked marijuana during a flight from New York to Mexico.<sup>69</sup> Applying New York choice of law principles, the court stated that district courts should invoke flexible procedures in the determination of foreign law, through any relevant material or source, whether or not admissible in evidence.<sup>70</sup> After finding that a true conflict existed and that Mexican law applied to the claims based on the carrier's employees' actions and the passenger's detention in Mexico, the court held that neither the airline nor its employees were liable under Mexican civil law because they had not acted "illicitly or against good customs and habits" by informing Mexican authorities of their suspicion that the plaintiff had smoked marijuana during the flight.<sup>71</sup> To the contrary, the airline and its employees acted in "compliance with specific regulatory requirements governing the conduct . . . of aircraft in Mexican airspace," and no requirements existed that airline employees question or search passengers before reporting such suspicions to authorities.<sup>72</sup>

#### F. RECOVERABLE DAMAGES

In *Dooley v. Korean Air Lines Co.*,<sup>73</sup> the Supreme Court laid to rest the issue of whether the Death on the High Seas Act<sup>74</sup> (DOHSA), allows recovery of pre-death pain and suffering damages through the mechanism of a survival action under the general maritime law, holding that it does not.<sup>75</sup> *Dooley* arose out of the September 1, 1983 Korean Airlines Flight KE007 shoot down accident over the Sea of Japan. Both the district court and District of Columbia Circuit had agreed with KAL that DOHSA did not allow recovery of non-pecuniary damages, including the

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<sup>69</sup> *Id.* at 9-10.

<sup>70</sup> *See id.* at 13 (citing Fed. R. Civ. P. 44(1)).

<sup>71</sup> *See id.* at 9, 15-16.

<sup>72</sup> *Id.* at 15-16; *see also* Kangiser v. Simmons Airlines, Inc., Southern District of Florida Civil No. 95-2388-CIV-GRAHAM (S.D. Fla. Order of August 3, 1998) (holding that applicable Colombian civil law (as determined based upon decedents' domicile) very severely limited the damages recoverable in a United States air crash wrongful death case). *Cf. In re Air Crash Near Cali, Columbia* on December 20, 1995, 24 F. Supp. 2d 1340, 1345-46 (S.D. Fla. 1998) (applying Florida damages law in Colombian air crash case, in part based on finding that the law of Columbia was too difficult to ascertain).

<sup>73</sup> 118 S. Ct. 1890 (1998).

<sup>74</sup> 46 U.S.C. App. §§ 761 (1994).

<sup>75</sup> *See Dooley*, 118 S. Ct. at 1892.

plaintiffs' claims for their decedents' alleged pre-death pain and suffering.<sup>76</sup> The Supreme Court granted certiorari to resolve a conflict between the circuits created by *Gray v. Lockheed Aeronautical Systems, Co.*<sup>77</sup> Citing 46 U.S.C. App. § 762, providing for the recovery under DOHSA of "pecuniary damages," and following its earlier decisions in *Offshore Logistics, Inc. v. Tallentire*<sup>78</sup> and *Mobil Oil Corp. v. Higginbotham*,<sup>79</sup> the Court held that Congress was clear in its specification of potential claimants and recoverable damages under DOHSA, which does not include either decedents' estates as claimants, by way of a survival action, or decedents' non-pecuniary damages.<sup>80</sup>

The Second Circuit followed *Dooley* in an unpublished opinion in *Tandon v. United Air Lines*.<sup>81</sup> In *Tandon*, the court issued a summary order affirming the dismissal of the plaintiff's claims for non-pecuniary losses arising out of a death occurring aboard a commercial aircraft over the high seas.<sup>82</sup>

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<sup>76</sup> See *In re Korean Air Lines Disaster of September 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996), *aff'd*, 117 F.3d 1477, 1481 (D.C. Cir. 1997), *aff'd*, 524 U.S. 116 (1998).

<sup>77</sup> 125 F.3d 1371, 1385 (11th Cir. 1997) (allowing recovery through a survival action under the general maritime law), *vacated and remanded*, 118 S. Ct. 2317 (1998). The Eleventh Circuit's analysis in *Gray* followed earlier circuit court decisions essentially finding that since DOHSA is literally silent as to exclusivity, supplementation through the mechanism of an extra-statutory survival action is not prohibited by the Act. 125 F.3d at 1385-86 (citing *Barbe v. Drummond*, 507 F.2d 794, 800 (1st Cir. 1974) and *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 466 F.2d 903, 909-10 (8th Cir. 1972)).

<sup>78</sup> 477 U.S. 207, 232-33 (1986) (holding that DOHSA remedies may not be supplemented by state law to allow recovery of loss of society damages).

<sup>79</sup> 436 U.S. 618, 625-26 (1978) (holding that DOHSA remedies may not be supplemented by the general maritime law to allow recovery of loss of society damages).

<sup>80</sup> See *Dooley*, 118 S. Ct. at 1895. "By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." *Id.* ("Because Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages.").

<sup>81</sup> 159 F.3d 1348 (2d Cir. 1998).

<sup>82</sup> See *Tandon*, No. 97-9058, 1998 WL 538102 (2d Cir. Aug. 20, 1998) (unpublished); Cf. *In re Air Crash Off Long Island, New York on July 17, 1996*, No. 96 Civ. 7986 (RWS), MDL 1161 (RWS), 1998 WL 292333, at \*1, 3, 7, 11 (S.D.N.Y. June 2, 1998) (finding DOHSA inapplicable to claims arising from the in-flight break-up of TWA Flight 800 some eight miles off Long Island because DOSHA's application to deaths occurring on "the high seas beyond a marine league" requires that such claims arise both on the "high seas" and "beyond a marine league" from shore to implicate the Act). The district court reasoned that to accept the defendants' argument that the statute defines "high seas" as being

In *Air Transport Ass'n of Canada v. Federal Aviation Administration*,<sup>83</sup> the court held that the Air Transport Association of Canada was entitled to attorneys' fees under the Equal Access to Justice Act<sup>84</sup> stemming from the group's successful challenge of overflight fees assessed by the FAA against foreign air carriers.<sup>85</sup> The court found the award of attorneys' fees justified because, contrary to the FAA's assertion, the overflight fee schedule at issue was not substantially justified.<sup>86</sup> No special circumstances made the fee award unjust, moreover, as the Air Transport Association of Canada claimed only fees which were associated with the issue on which it prevailed and had fully documented its claim.<sup>87</sup>

### G. PUNITIVE DAMAGES

In *Cimino v. Raymark Industries, Inc.*,<sup>88</sup> the Fifth Circuit, applying Texas law in a non-aviation product liability case, held that a punitive damages "multiplier" of \$3 for every \$1 of actual damages awarded against an asbestos manufacturer in a class action was not excessive.<sup>89</sup> In so doing, the court upheld the use of a "multiplier" to determine punitive damages, and rejected the defendant's due process argument that the overall award was excessive.<sup>90</sup> The court also rejected the plaintiff's argument that under Texas law the punitive damages multiplier should also apply to prejudgment interest awarded by the trial court.<sup>91</sup> Finally, the court rejected the plaintiff's contention that one of the defendants should be held jointly liable for the exemplary dam-

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beyond one marine league (i.e. three nautical miles) would render the latter phrase surplusage, contrary to basic tenets of statutory construction. *Id.* at 3. To arrive at its holding, the court also addressed whether DOHSA incorporates in the definition of "high seas" the twelve nautical mile United States territorial limit created by President Reagan's 1988 Proclamation (No. 5928, 54 Fed. Reg. 777 (1988)), holding that it does. *See id.* at \*11.

<sup>83</sup> 156 F.3d 1329 (D.C. Cir. 1998).

<sup>84</sup> 28 U.S.C. § 2412(d) (1994).

<sup>85</sup> *Air Transport Ass'n of Can.*, 156 F.3d at 1330-31.

<sup>86</sup> *See id.* at 1330-33.

<sup>87</sup> *See id.* at 1333-35; *see also* *Moldawsky v. Simmons Airlines, Inc.*, 14 F. Supp. 2d 533, 534-35 (S.D.N.Y. 1998) (reducing damage awards to teenage and adult children of passengers killed in airline crash, holding that New York pecuniary damages law required both reasonable compensation and consideration of the age and degree of dependency of the children).

<sup>88</sup> 151 F.3d 297 (5th Cir. 1998).

<sup>89</sup> *Id.* at 323-24.

<sup>90</sup> *See id.* at 323.

<sup>91</sup> *See id.* at 324-25 (analyzing Texas decisions).

ages assessed against a bankrupt co-defendant.<sup>92</sup> The court noted that the defendants had not acted jointly to commit a single wrong, but rather had acted separately, and the jury had also considered the issue of punitive damages separately as to each.<sup>93</sup>

In *Grabinski v. Blue Springs Ford Sales, Inc.*,<sup>94</sup> the Eighth Circuit affirmed in part and reversed in part in an action brought by an automobile purchaser against a dealership and dealership employees alleging fraud in violation of the Missouri Merchandising Practices Act.<sup>95</sup> Partially reversing, the court held with respect to punitive damages claims that the district court was required under both federal and Missouri law to review awards for excessiveness upon motion of a party.<sup>96</sup> In so holding, the court rejected the plaintiff's argument that the court of appeals itself should conduct a review for excessiveness by applying the principles laid out in *BMW of North America, Inc. v. Gore*.<sup>97</sup> Rather, the court held that the matter was controlled by *Gasperini v. Center for Humanities, Inc.*,<sup>98</sup> which the Eighth Circuit read as concluding that district courts, and not the courts of appeals, have primary responsibility for review of allegedly excessive jury verdicts.<sup>99</sup> The court also cited the practical considerations supporting its holding, parroting the Supreme Court's recognition in *Gasperini* that "[t]rial judges have the unique opportunity to consider the evidence in the living courtroom context . . . while appellate judges see only the cold paper record."<sup>100</sup>

In January 1998 the Missouri Supreme Court denied review in *Letz v. Turbomeca Engine Corp.*<sup>101</sup> and *Barnett v. La Societe Anonyme Turbomeca France*,<sup>102</sup> letting stand two remitted, yet still very significant, compensatory and punitive damage judgments entered against a helicopter engine manufacturer in personal injury and wrongful death cases after trial by jury.<sup>103</sup> In *Letz*, a remitted

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<sup>92</sup> See *id.* at 325-27.

<sup>93</sup> See *id.* at 326-27.

<sup>94</sup> 136 F.3d 565 (8th Cir. 1998).

<sup>95</sup> See *id.* at 566-68.

<sup>96</sup> See *id.* at 571-72.

<sup>97</sup> 517 U.S. 559, 562, 575, 577-81 (1996).

<sup>98</sup> 518 U.S. 415, 434-39 (1996).

<sup>99</sup> See *Grabinski*, 136 F.3d at 572.

<sup>100</sup> *Id.* (noting also *Gasperini's* directive that appellate consideration of trial court determinations regarding excessiveness is limited to review for abuse of discretion) (internal quotations and citations omitted).

<sup>101</sup> 975 S.W.2d 155 (Mo. Ct. App. 1997).

<sup>102</sup> 963 S.W.2d 639 (Mo. Ct. App. 1997), *cert. denied*, 119 S. Ct. 75 (1998).

<sup>103</sup> See *id.* at 645, 669.



compensatory award of \$2.5 million and punitive award of \$26.5 million were allowed to stand.<sup>104</sup> In *Barnett*, a compensatory award remitted to \$3.5 million and a punitive award remitted to \$26.5 million were allowed to stand.<sup>105</sup>

## H. EVIDENCE

### 1. Admission of Evidence

In *Campbell v. Keystone Aerial Surveys, Inc.*,<sup>106</sup> a pilot's widow and children brought a wrongful death and survival action against the company for which the decedent had been conducting aerial surveys when he was killed.<sup>107</sup> Among other evidentiary issues addressed by the Fifth Circuit, the court held that a former employee of the National Transportation Safety Board (NTSB) could properly testify as an expert witness in the case even though he had worked in the NTSB field office that investigated the accident.<sup>108</sup> After analyzing NTSB regulations covering testimony by Board employees,<sup>109</sup> the court found that allowing the testimony at issue would not offend their spirit because the opinions offered were not formulated as part of the witness's official duties with the NTSB, the witness had no investigative function regarding the accident, and the fact that he had worked in the NTSB field office that investigated the subject crash, without more, was insufficient cause to disallow the testimony.<sup>110</sup> That the witness had testified at trial that he worked for the NTSB also did not change the Fifth Circuit's view.<sup>111</sup> The court noted that there was "no mention . . . made of [the witness's] connection to the investigating office, and [the witness had also] clearly testified that he was retired from the NTSB."<sup>112</sup> The court did admonish, however, "that on retrial [the defendant] would be well advised to avoid making a show of [the witness's] NTSB lapel pin."<sup>113</sup>

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<sup>104</sup> 975 S.W.2d at 180.

<sup>105</sup> 963 S.W.2d at 669; *Cf. In re Aircrash Disaster Near Monroe, Mich.*, on January 9, 1997, 20 F. Supp. 2d 1110, 1112-13 (E.D. Mich. 1998) (holding that Michigan law applied to bar recovery of punitive damages against an air carrier and an aircraft manufacturer in actions arising from a fatal accident in Michigan).

<sup>106</sup> 138 F.3d 996 (5th Cir. 1998).

<sup>107</sup> *See id.* at 999.

<sup>108</sup> *See id.* at 1001-02.

<sup>109</sup> *See* 49 C.F.R. pt. 835 (1998).

<sup>110</sup> *See Campbell*, 138 F. 3d at 1002.

<sup>111</sup> *See id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1002 n.5 (5th Cir. 1998).

Addressing the separate issue of the pilot's alleged violations of Federal Aviation Regulations, the court held that on retrial the defendant "should [not] be precluded from presenting [relevant regulations] to the jury as evidence of what a reasonable pilot would have done under [similar] circumstances."<sup>114</sup> The court found that "[e]ven if a violation of a regulation does not constitute negligence per se . . . [it might] still provide evidence that [a party] deviated from the applicable standard of care."<sup>115</sup>

Finally, the court also addressed the issue of whether testimony or photographs of the decedent's remains should be admitted to show the extent of the mental anguish suffered by his family members.<sup>116</sup> In addressing specific items of evidence, the court affirmed the district court's decision to bar admission of photographs of the decedent's decapitated remains under Federal Rule of Evidence 403 to avoid a potentially visceral response by the jury.<sup>117</sup> The court also held, however, that testimony regarding the condition of the decedent's remains would be admissible.<sup>118</sup> The evidence was assertedly relevant to the issue of the mental anguish suffered by the decedent's survivors, and the testimony alone would probably not have the same prejudicial impact on jurors that photographic depictions might.<sup>119</sup>

## 2. *Daubert and Expert Testimony*

In *Desrosiers v. Flight International of Florida Inc.*,<sup>120</sup> the court held in an airplane crash case, *inter alia*, that the admissibility of testimony of an accident reconstruction expert, being "technical" rather than "scientific" in nature, was not governed by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>121</sup> but instead by Federal Rules of Civil Procedure 702 and 703 generally.<sup>122</sup> The court distinguished as dicta language in other decisions indicating that *Daubert's* analysis applies to "technical" evidence as well.<sup>123</sup> The court also held that the admission of only portions

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<sup>114</sup> *Id.* at 1003.

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 1003-04.

<sup>117</sup> *See id.* at 1004.

<sup>118</sup> *See id.* at 1005.

<sup>119</sup> *See id.* at 1004-05.

<sup>120</sup> 156 F.3d 952 (9th Cir. 1998).

<sup>121</sup> 509 U.S. 579, 593-95 (1993).

<sup>122</sup> *See Desrosiers*, 156 F.3d at 960-63.

<sup>123</sup> *See id.* at 960 n.9.

of a JAG report on the accident deemed trustworthy by the trial court was proper.<sup>124</sup>

### 3. *Spoilation of Evidence*

In *Jordan F. Miller Corp. v. Mid-Continent Aircraft Service, Inc.*,<sup>125</sup> an unpublished decision, the court affirmed dismissal of an action due to spoilation of evidence which was "so prejudic[ial to the defense] that no lesser sanction would insure . . . a fair trial."<sup>126</sup> Plaintiff's claims arose out of the purchase of a Cessna twin-engine airplane. While landing the aircraft after purchase, the main landing gear collapsed. Plaintiff then filed suit alleging breach of contract, breach of warranty, negligence and product liability based on the collapse of the gear and various other alleged defects in the aircraft. Prior to trial, all but one of the component parts of the failed gear were lost or destroyed.<sup>127</sup> After analyzing numerous decisions imposing sanctions on a party for failing to preserve evidence, the court held that the sanction of dismissal was appropriate, adopting the district court's reasoning that a lesser sanction (an adverse inference instruction) would not provide a fair trial which could only have come from the view and inspection of the components.<sup>128</sup>

In *Cedars-Sinai Medical Center v. Superior Court*,<sup>129</sup> the Supreme Court of California held that there is no California state law tort remedy for the intentional spoilation of evidence by a party if the victim knew or should have known of the matter before a decision on the merits of the underlying claim is rendered.<sup>130</sup> *Cedars-Sinai* arose out of an injury to a child during birth. Plaintiffs contended that the defendant hospital had intentionally destroyed evidence relevant to the malpractice action that ensued and brought a separate cause of action in tort sounding in "intentional spoilation—that is, intentional destruction or suppression—of evidence."<sup>131</sup> In holding that no such independent

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<sup>124</sup> See *id.* at 961-62 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163-64 (1988) and *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992) (stating that public records covered by Federal Rule of Evidence 803(8)(C) can be challenged as untrustworthy)).

<sup>125</sup> 139 F.3d 912, No. 97-5089, 1998 WL 68879, \*1 (10th Cir. Feb. 20, 1998) (unpublished).

<sup>126</sup> *Id.* at \*1.

<sup>127</sup> See *id.* at \*1-2.

<sup>128</sup> See *id.* at \*7.

<sup>129</sup> 954 P.2d 511 (Cal. 1998).

<sup>130</sup> See *id.* at 512.

<sup>131</sup> See *id.* at 512-13.

tort existed, at least in the situation where the victim discovers the conduct prior to adjudication of the underlying claim, the court found that non-tort remedies for spoliation (such as sanctions and cautionary instructions) were both extensive and effective to deter such conduct and to remedy it should it occur.<sup>132</sup>

### III. LIABILITY OF AIR CARRIERS IN WARSAW CONVENTION CARRIAGE

#### A. EXCLUSIVITY

In *Shah v. Pan American World Services, Inc.*,<sup>133</sup> the Second Circuit made various pronouncements of interest under the Warsaw Convention.<sup>134</sup> *Shah* arose out of the September 1986 hijacking of Pan American Flight 73 in Karachi, Pakistan that lead to almost two dozen deaths and numerous injuries. Fundamentally, the case presented the issue of whether an air carrier's fraudulent misrepresentations could constitute "wilful misconduct" so as to make inapplicable the Convention's liability limitation.<sup>135</sup> Plaintiffs alleged that Pan Am had falsely represented that it had embarked on an enhanced security program, which was claimed to have induced the plaintiffs or their decedents to fly.<sup>136</sup>

Addressing Convention exclusivity, the court found that all of the plaintiffs' state law claims "for rescission, negligence, wrongful death, conspiracy to defraud, breach of contract, and fraud [were] . . . 'within the scope' of Article 17 of the Convention, in that they all [sought] damages for 'the death or wounding of a passenger or any other bodily injury suffered by a passenger' caused by an 'accident' . . . in international [air] transportation." Thus, all such claims were preempted by the Convention.<sup>137</sup>

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<sup>132</sup> See *id.* at 520-21.

<sup>133</sup> 148 F.3d 84 (2d Cir. 1998), *cert. denied sub nom.* Singh v. Pan American World Airways, Inc., 119 S. Ct. 1033 (1999) and *cert. denied sub nom.* Patel v. Pan American World Airways, Inc., 119 S. Ct. 1034 (1999).

<sup>134</sup> See *id.* at 88 (citing the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, TS No. 876 (1934), *reprinted in*, 49 U.S.C. § 40105 (1997)).

<sup>135</sup> See *id.* at 88-90.

<sup>136</sup> See *id.*

<sup>137</sup> *Id.* at 97-98 (citing *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141 (2d Cir. 1998) and *Coker v. Pan American World Airways, Inc.*, 950 F.2d 839, 847 (2d Cir. 1991)).

In *Tseng v. El Al Israel Airlines, Ltd.*,<sup>138</sup> the court addressed whether a plaintiff passenger had suffered an "accident" under Article 17 of the Convention, holding that she had not because the allegedly wrongful body search conducted was part of the carrier's normal operations and was not carried out in an unreasonable manner. Certiorari was granted in *Tseng*,<sup>139</sup> ostensibly for review of the Convention exclusivity (preemption) issue in the case where no "accident" under the Convention occurs. The Supreme Court heard oral argument in the matter on November 10, 1998, and found exclusivity.<sup>140</sup>

#### B. EVENTS WITHIN THE SCOPE OF THE CONVENTION

In *Fishman v. Delta Air Lines, Inc.*,<sup>141</sup> the Second Circuit held that the "accident" necessary to implicate Article 17 of the Warsaw Convention could be one resulting from an airline's normal operations or routine procedures in the operation of an aircraft if those operations or procedures are carried out in an unreasonable manner.<sup>142</sup> In *Fishman*, a child passenger was injured when a flight attendant, attempting to soothe the child's earache with a hot compress, spilled scalding water on the child's neck and shoulders.<sup>143</sup> Rejecting the argument that the incident was not an "accident" because it arose in the course of the airline's normal operations, the court also reaffirmed that state law claims for passenger injury or death cognizable under Article 17 are preempted by the Convention.<sup>144</sup> It also noted that claims for purely emotional injuries are also encompassed by Article 17, and are unrecoverable as a matter of the law of the Convention.<sup>145</sup>

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<sup>138</sup> 122 F.3d 99 (2d Cir. 1997), *cert. granted in part*, 118 S. Ct. 1793 (1998), *rev'd sub nom.*, 119 S. Ct. 662 (1999).

<sup>139</sup> 118 S. Ct. 1793, 1793 (1998).

<sup>140</sup> 525 U.S. 155 (1999).

<sup>141</sup> 132 F.3d 138 (2d Cir. 1998).

<sup>142</sup> *Id.* at 141-43.

<sup>143</sup> *See id.* at 140.

<sup>144</sup> *See id.* at 142 (citing *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 928 F.2d 1267, 1273-76, 1282 (2d Cir. 1991)).

<sup>145</sup> *See Fishman*, 132 F.3d at 142 (citing *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991)); *see also* *Dias v. Transbrasil Airlines, Inc.*, 26 Av. Cas. (CCH) 16048, 16049 (S.D.N.Y. 1998) (holding that poor cabin air was an "accident" under the Convention); *Goodwin v. Air France*, No. C 97-1997 FMS, \*1 (N.D. Cal. June 2, 1998) (holding that "as a matter of law, an attack by a fellow passenger can constitute an 'accident' under the Warsaw Convention"); *Ratnaswamy v. Air Afrique*, No. 95 C 7670, 1998 WL 111652, at \*3-6 (N.D. Ill. Mar. 3, 1998) (denying airline's motion for partial summary judgment, holding that a claim arising

## C. INJURIES WITHIN THE SCOPE OF THE CONVENTION

In *Terrafranca v. Virgin Atlantic Airways Ltd.*,<sup>146</sup> plaintiff sued under the Warsaw Convention for recovery of claimed emotional distress damages—post-traumatic stress and anorexia—allegedly caused when she and all passengers were advised by the aircraft's captain that a nonspecific and uncredible bomb threat had been made against various targets including the plane.<sup>147</sup> Relying on *Eastern Airlines, Inc. v. Floyd*,<sup>148</sup> the Third Circuit affirmed a summary judgment granted in favor of the defendant airline on the basis that plaintiff had failed to allege the requisite "bodily injury" necessary to obtain relief under the Convention.<sup>149</sup> Plaintiff had argued, seizing on a passage from *Floyd*, that the weight loss she suffered subsequent to the event was sufficient "physical manifestation of injury" to recover.<sup>150</sup> The court of appeals disagreed, finding that the Supreme Court's reference in *Floyd* to "physical manifestation of injury" could only have meant "bodily injury" in fact, and not psychic or psychosomatic injuries held barred by that very decision.<sup>151</sup> The court noted that the plaintiffs in *Floyd* had also allegedly suffered sleeplessness, arguably a physical manifestation of emotional injury.<sup>152</sup>

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from severe delay upon return from Senegal constituted an "accident" and that state law claims were thus preempted by the Convention). Cf. *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 201-05 (D. Mass. 1998) (granting Delta's motion for summary judgment and dismissing plaintiff's entire claim, holding that plaintiff must prove "a malfunction or abnormality in the aircraft's operation" as one of two elements of an "accident" under the Convention, and that the actions of an independent, third party passenger do not fall within the scope of an aircraft's operation); *Brown v. U.S. Airways, Inc.*, No. Civ. A. 97-CV-7238, 1998 WL 634901, at \*3-5 (E.D. Pa. Sept. 16, 1998) (holding that couple injured in the crash of an airport shuttle were entitled to seek punitive damages because the Convention, including its prohibition of punitive damages, did not apply to a claim that did not arise from the "embarking or disembarking from [an aircraft]" and therefore was not an "accident").

<sup>146</sup> 151 F.3d 108 (3d Cir. 1998).

<sup>147</sup> See *id.* at 109.

<sup>148</sup> 499 U.S. 530, 534-35 (1991) (holding that the Warsaw Convention's original French "lésion corporelle," translated as "bodily injury," does not encompass purely psychic injuries).

<sup>149</sup> See *Terrafranca*, 151 F.3d at 110.

<sup>150</sup> *Id.* at 111 (quoting *Floyd*, 499 U.S. at 552).

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

## D. WILFUL MISCONDUCT AND LIMITATION OF LIABILITY

In *Shah v. Pan American World Services, Inc.*,<sup>153</sup> the Second Circuit addressed specifically the issue of whether air carrier fraudulent misrepresentations could constitute "wilful misconduct" so as to make inapplicable the Convention's liability limitation.<sup>154</sup> Addressing alleged air carrier misrepresentations of increased security which were claimed to have induced travel, the court held that such conduct by an air carrier (via advertising or otherwise), which induces a passenger to purchase a ticket for carriage, may constitute "wilful misconduct" if the carrier "acted either (1) with knowledge that its actions would probably result in injury or death, or (2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions."<sup>155</sup>

The court also addressed the issue of the Convention's causation element necessary for the imposition of liability for fraud-based "wilful misconduct," noting it to be one of first impression in the United States.<sup>156</sup> After recognizing three possible interpretations of the causation language of Article 25 as applied to fraud-based "wilful misconduct," the court held that to establish causation in such circumstances a plaintiff must prove by a preponderance of the evidence first that its reasonable reliance on the misrepresentation induced carriage and, second, that the damage would not have occurred if the carrier had performed as promised.<sup>157</sup>

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<sup>153</sup> 148 F.3d 84 (2d Cir. 1998).

<sup>154</sup> *Id.* at 93.

<sup>155</sup> *Id.* (citing *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1998, 37 F.3d 804, 812 (2d Cir. 1994) (defining "wilful misconduct" under the Convention)).

<sup>156</sup> *See id.*, 148 F.3d at 93-96.

<sup>157</sup> *See id.* at 94-95; *see also* *American Home Assurance Co. v. Jacky Maeder (Hong Kong) Ltd.*, No. 96 Civ. 5154 (LAK), 1998 WL 213194, at \*3-5 (S.D.N.Y. Apr. 29, 1998) (holding cargo carrier liable for \$250,000 worth of stolen watches without application of Warsaw Convention liability limits, because "agreed stopping places" were not sufficiently stated in waybill because it did not contain correct flight number and thus reference to carrier's timetables was insufficient to notify sender of the agreed stopping places). *Cf. Yanovskiy v. Air France*, No. 98 Civ. 0174 (LMM), 1998 WL 305648, at \*2-3 (S.D.N.Y. June 10, 1998) (dismissing complaint, holding that claims for missing luggage and delay in transportation were time-barred by the Convention and that "wilful misconduct" allegation would not preclude application of Convention's statute of limitations), *aff'd*, 173 F.3d 848 (2d Cir. 1999).

*Brink's Ltd. v. South African Airways*<sup>158</sup> addressed the meaning of "wilful misconduct" as used in Article 25 of the Warsaw Convention under South African law, based on English Convention interpretation.<sup>159</sup> The decision also illustrates the practical proof problems oftentimes encountered by shippers. In *Brink's Ltd.*, a consignee of precious metals sued an air carrier to recover for stolen cargo.<sup>160</sup> In upholding the district court's finding of insufficient evidence of "wilful misconduct" on the part of the carrier or any of its agents (the plaintiff had no means to prove how the alleged theft occurred, let alone that the carrier or its agents knowingly converted the property or knowingly failed to prevent the theft), the Second Circuit first noted the dearth of applicable South African decisions interpreting Article 25's "wilful misconduct" language, and so looked to English cases for guidance.<sup>161</sup> Articulating the English standard that to be guilty of "wilful misconduct" the actor "must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be," the court affirmed based on the failure of proof.<sup>162</sup> The consequence was limited liability for the carrier of \$1,520 related to a shipment allegedly valued at approximately \$1.8 million.<sup>163</sup>

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<sup>158</sup> 149 F.3d 127 (2d Cir. 1998).

<sup>159</sup> See *id.* at 132-33.

<sup>160</sup> See *id.* at 129.

<sup>161</sup> See *id.* at 132-33 (citing *Rustenberg Platinum Mines Ltd. v. South African Airways*, 1 Lloyd's Rep. 564, 569 (Q.B. 1977), *appeal dismissed*, 1 Lloyd's Rep. 19 (C.A. 1979) and *Horabin v. British Overseas Airways Corp.*, 2 All E.R. 1016, 1022 (Q.B. 1952)).

<sup>162</sup> See *id.* at 133 (citing *Horabin*, 2 All E.R. at 1022).

<sup>163</sup> See *id.* at 129, 132; see also *Federal Ins. Co. v. Yusen Air & Sea Serv. (S) Pte. Ltd.*, No. 97 Civ. 3830 (HB), 1998 WL 477987, at \*4-6 (S.D.N.Y. Aug. 14, 1998) (granting carrier's motion for partial summary judgment, limiting liability for \$324,000 worth of lost integrated circuits to \$380 pursuant to Article 22 of the Warsaw Convention, and holding that waybill sufficiently incorporated KLM's timetables, and thus "agreed stopping places," by reference); *Southern Elec. Distrib., Inc. v. Air Express Int'l Corp.*, 994 F. Supp. 1472, 1474, 1476-78 (N.D. Ga. 1998) (limiting liability for failure to deliver \$182,000 worth of missing hard drives to \$5,297 under Article 22 of the Warsaw Convention, holding that "agreed stopping places" were sufficiently identified in waybill via reference to readily available timetables and despite the fact that ground carrier was not specifically identified or its stops disclosed); *Waxman v. C.I.S. Mexicana de Aviacion, S.A. de C.V.*, 13 F. Supp. 2d 508, 510, 512, 515 (S.D.N.Y. 1998) (holding air carrier's agent's aircraft cleaning subcontractor was entitled to protection under the limitation of liability provisions of Article 25).



## IV. NON-WARSAW AIR CARRIER LIABILITY

## A. AIRLINE DEREGULATION ACT PREEMPTION

1. *Preemption*

In *Smith v. Comair, Inc.*,<sup>164</sup> the Fourth Circuit held that a passenger's claims against an airline for breach of contract, false imprisonment, and intentional infliction of emotional distress allegedly arising from the airline's refusal to permit him to board his flight after a layover, were preempted by the Airline Deregulation Act (ADA).<sup>165</sup> The court found that all of the state law claims were preempted because they related to the airline's provision of a "service," namely the airline's boarding practices.<sup>166</sup> The court stated that to allow fifty states to impose differing standards on such claims would conflict with exclusive federal regulation of airlines' "services," including boarding practices; thus, "to the extent Smith's claims are based upon Comair's boarding practices, they clearly relate to an airline service and are preempted under the ADA."<sup>167</sup> The court further held that, to the extent they may not be preempted, the passenger failed to state claims under Kentucky law for either false imprisonment or intentional infliction of emotional distress because his allegations that the airline had flown him to an airport, stranded him there, lied to him and rudely failed to assist him, did not state cognizable claims.<sup>168</sup>

The Second Circuit addressed ADA and federal aviation preemption more generally in *National Helicopter Corp. of America v. City of New York*.<sup>169</sup> *National Helicopter Corp.* involved the exception to preemption for "acts passed by state and local agencies in the course of 'carrying out their proprietary powers and

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<sup>164</sup> 134 F.3d 254 (4th Cir. 1998).

<sup>165</sup> See *id.* at 259; 49 U.S.C. § 41713(b)(1) (stating that "[a] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . .").

<sup>166</sup> See *Smith*, 134 F.3d at 258-59.

<sup>167</sup> *Id.* at 259.

<sup>168</sup> See *id.* at 259-60; cf. *Guerrero v. American Airlines, Inc.*, No. 97 Civ. 1948 (SHS), 1998 WL 196199, \*2-3 (S.D.N.Y. Apr. 22, 1998) (granting carrier's motion for summary judgment in an overbooking case involving the downgrading of a passenger and his companion one class of service, based on the airline's tariffs); *Price v. Delta Airlines, Inc.*, 5 F. Supp. 2d 226, 231-36 (D. Vt. 1998) (holding that claims for breach of carriage terms and to enforce Air Carrier Access Act of 1986 were not preempted by the ADA).

<sup>169</sup> 137 F.3d 81, 88-92 (2d Cir. 1998).

rights.’”<sup>170</sup> The court held some of New York’s permit restrictions upon a helicopter operator’s operations at a City heliport, such as curfews on and phasing out of some facility operations, reasonable and within the noise and environmental areas properly regulated by local authority and thus not preempted.<sup>171</sup> It also held other restrictions, such as route conditions on sight-seeing flights and the banning of certain larger aircraft, unreasonable or outside the scope of allowable local regulation (the route conditions affected airspace control) and thus preempted.<sup>172</sup> As to the applicability of the exception, the Second Circuit held that the factual allegations underlying the claim were the proper focus of the preemption analysis.<sup>173</sup>

## 2. No Preemption

Also addressing the preemption analysis, the Eleventh Circuit in *Parise v. Delta Airlines, Inc.*<sup>174</sup> held that the district court had improperly premised a Florida state law age discrimination claim preemption finding on the relationship between the plaintiff and former airline employee’s alleged violent outburst toward co-workers and the “service” of safety that an airline is bound to provide.<sup>175</sup> The carrier had compellingly asserted that the former employee’s threatening behavior related to the “valid airline safety concerns.”<sup>176</sup> However, the court found that the complaint set forth a cause of action for age discrimination, and the airline employer’s alleged justification for its termination of plaintiff’s employment could not be used as the basis for its preemption argument.<sup>177</sup> The court concluded that it was the airline’s answer to the complaint that appeared to provide the asserted ground for preemption, yet “it is the cause of action

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<sup>170</sup> *Id.* at 88 (quoting 49 U.S.C. § 41713(b)(3)).

<sup>171</sup> *See id.* at 90-91.

<sup>172</sup> *See id.* at 91-92.

<sup>173</sup> *See id.* at 89 (analyzing factual basis of allegations); *see also* Moayeri v. Southwest Airlines Co., No. C 97-101253 CW, 1998 WL 19472, at \*2-4 (N.D. Cal. Jan. 7, 1998) (holding that claim of assault by airline boarding attendant was “related to a service” and therefore preempted by the ADA); *Wine & Spirits Wholesalers of Mass., Inc. v. Net Contents, Inc.*, 10 F. Supp. 2d 84, 87 (D. Mass. 1998) (holding that wholesalers’ tortious interference with business relations claim against air freight carrier, based upon state statute, was related to air transport “services” and thus preempted by the ADA).

<sup>174</sup> 141 F.3d 1463 (11th Cir. 1998).

<sup>175</sup> *See id.* at 1466-68.

<sup>176</sup> *Id.* at 1464-65.

<sup>177</sup> *See id.* at 1466.

and the underlying state law on which it is founded" that should inform the preemption analysis.<sup>178</sup> The court therefore reversed the lower court's finding that plaintiff's Florida Civil Rights Act claim was preempted by the ADA.<sup>179</sup>

In *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*,<sup>180</sup> the Ninth Circuit held that the California Prevailing Wage Law (CPWL)<sup>181</sup> was not preempted by the Federal Aviation Administration Act (FAAA)<sup>182</sup> as applied to the trucking industry. The court held that:

Although CPWL is not entirely unrelated "to a price, route or service of . . . motor carriers," the teachings of recent Supreme Court cases make clear that a state law dealing with matters traditionally within its police powers, and having no more than an *indirect, remote, and tenuous* effect on motor carriers, are not preempted. Such is the case here. Thus, we affirm the district court's dismissal of plaintiff's complaint.<sup>183</sup>

The plaintiff dump truck association had sued several California agencies vested with statutory authority to enforce the CPWL, arguing that the FAAA preempted the CPWL. The court found unpersuasive the dump truck association's allegations that its rates for "services" were based upon "costs, including cost of labor."<sup>184</sup> Instead, the court held: "We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition."<sup>185</sup> Thus, the court found that the relatedness of the CPWL to a motor carrier's provision of services was insufficient for preemption to apply.<sup>186</sup>

Following the tenor of *Californians for Safe and Competitive Dump Truck Transportation*, the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*,<sup>187</sup> "clarifying" its decisions in two prior cases, wrote:

[I]n enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the

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<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at 1465, 1467-68.

<sup>180</sup> 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1377 (1999).

<sup>181</sup> CAL. LAB. CODE §§ 1770-80 (West 1989 & Supp. 1999).

<sup>182</sup> 49 U.S.C. §§ 14501-14505 (containing preemption language identical to that of the ADA).

<sup>183</sup> *See Mendonca*, 152 F.3d at 1185.

<sup>184</sup> *Id.* at 1187-89.

<sup>185</sup> *Id.* at 1189.

<sup>186</sup> *See id.*

<sup>187</sup> 160 F.3d 1259 (9th Cir. 1998).

airline industry. Congress did not intend to preempt passengers' run-of-the-mill personal injury claims. Accordingly, we hold that Congress used the word "service" in the phrase "rates, routes, or service" in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. In the context in which it was used in the Act, "service" was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.<sup>188</sup>

The court thus expressly overruled its decisions in *Harris v. American Airlines, Inc.*<sup>189</sup> and *Gee v. Southwest Airlines*<sup>190</sup> to the extent that those decisions were inconsistent with the opinion rendered in *Charas*, and further confused inter-circuit law on the issue.<sup>191</sup> The decision in *Charas* addressed several personal injury cases arising from airline "services" such as the provision of beverages, maintaining aircraft cleanliness, and passenger assistance. Relying on the Supreme Court's decisions in *American Airlines, Inc. v. Wolens*<sup>192</sup> and *Morales v. Trans World Airlines, Inc.*<sup>193</sup> both of which addressed ADA preemption, and on the plain language of the statute and the congressional intent in enacting the ADA to achieve the economic deregulation of the airline industry, the *Charas* court held:

We conclude that when Congress enacted *federal* economic deregulation of the airlines, it intended to insulate the industry from possible *state* economic regulation as well. It intended to encourage the forces of competition. It did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct. Like "rates" and "routes," Congress used "service" in § 1305(a)(1) in the public utility sense—i.e., the provision of air transportation to and from various markets at various times. In that context, "service" does not refer to the pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions. We expressly overrule our

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<sup>188</sup> *Id.* at 1261.

<sup>189</sup> 55 F.3d 1472 (9th Cir. 1995), *overruled by*, 160 F.3d 1259 (9th Cir. 1998).

<sup>190</sup> 110 F.3d 1400 (9th Cir. 1997), *overruled by*, 160 F.3d 1259 (9th Cir. 1998).

<sup>191</sup> *Cf. Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (finding no preemption of negligence-based personal injury claim and establishing Fifth Circuit "operation[s] [or] maintenance" test for determining preemption).

<sup>192</sup> 513 U.S. 219 (1995).

<sup>193</sup> 504 U.S. 374 (1992).

decisions in *Harris* and *Gee* to the extent that they are inconsistent with this interpretation.<sup>194</sup>

## B. AIRLINE LIABILITY

### 1. *Liability to Third Parties*

In *Pittman v. Grayson*,<sup>195</sup> the Second Circuit affirmed a judgment n.o.v. entered in favor of a defendant airline in a case alleging the latter had conspired with the mother of a minor to assist her in unlawfully taking the child out of the jurisdiction contrary to court order.<sup>196</sup> Analyzing the issue under New York law, the court held that there was insufficient proof to support a jury finding that the airline had aided and abetted, interfering with the father's parental custody.<sup>197</sup> In so holding, the court found that New York law required that in order for the carrier to be liable for acting in concert with a primary tortfeasor under either a conspiracy or aiding and abetting theory, the carrier had to have had knowledge that the tortfeasor (mother) was illegally transporting the child.<sup>198</sup> That the carrier had violated its own prescribed procedures by allowing the mother and child to

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<sup>194</sup> *Charas*, 160 F.3d at 1266; *see also* *Lagrotte v. AMR Corp.*, No. Civ. A. 3:97-CV-1278P, 1998 WL 133140, at \*2-6 (N.D. Tex. March 16, 1998) (holding that pilot's wrongful termination claims were not preempted by the ADA or Railway Labor Act, and thus remanding for lack of federal subject matter jurisdiction); *City of Fort Worth v. City of Dallas*, No. 4:97-CV-939-A, 1998 WL 50457, at \*1-3 (N.D. Tex. Jan. 20, 1998) (holding that litigation regarding passenger service from Love Field was not preempted by the ADA under 49 U.S.C. §41713(b)(3), relating to "proprietary powers and rights of airport owners and operators," and finding no other federal question and therefore remanding); *Luciano v. Trans World Airlines, Inc.*, NO. 96-CV-3999 (FB), 1998 WL 433808, \*1-4 (E.D.N.Y. July 28, 1998) (holding that passenger's negligence claim arising from a slip and fall at a security checkpoint was not preempted by the ADA, but granting motion for summary judgment for lack of proof of causation or notice of a dangerous condition). *Cf.* *Air Transport Ass'n of America v. City and County of San Francisco*, 992 F. Supp. 1149, 1180-88 (N.D. Cal. 1998) (holding that ordinance which prohibited the city from contracting with companies whose employee benefit plans discriminated between employees with spouses and employees with domestic partners was preempted by the ADA *only* to the extent that the "potential cost or other burden of bringing a carrier's benefit plans into compliance with the otherwise-valid portions of the Ordinance is so great that air carriers will be coerced into changing their routes" and that the Ordinance did not "relate to service . . . [or] to price" such as to be preempted by the ADA on those bases).

<sup>195</sup> 149 F.3d 111 (2d Cir. 1998), *cert. denied*, 120 S. Ct. 59, No.98-1940, 1999 WL 386633 (U.S. Oct. 4, 1999).

<sup>196</sup> *See id.* at 114.

<sup>197</sup> *See id.* at 118-24.

<sup>198</sup> *See id.* at 122-23.

fly under names different from those on their reservations, and also "falsified the weight-and-balance codes to disguise" the age and gender of the persons traveling together, were insufficient to impose liability.<sup>199</sup> While this evidence supported the inference that the airline had assisted the mother, the carrier's only notice of alleged illegality came from telephone calls from a man whose identity was not documented, who made unverifiable representations that the mother's travel with the child was restricted by court order.<sup>200</sup> The court concluded that "knowledge that conduct is clandestine does not necessarily include knowledge of its motivation or legality."<sup>201</sup>

In *C & S Acquisitions Corp. v. Northwest Aircraft, Inc.*,<sup>202</sup> the court held that a provision in an aircraft lease requiring the airline lessee to negotiate in good faith before renewing leases on certain transport category aircraft was unenforceable as a matter of Minnesota law as an agreement merely to negotiate in the future.<sup>203</sup> The court held that under the law of that state such provisions are "not enforceable because [they do] not constitute the parties' complete and final agreement."<sup>204</sup>

## 2. *Liability to Employees*

In *Fredrick v. Simmons Airlines, Inc.*,<sup>205</sup> a terminated airline pilot brought an action against his employer and its parent and related companies for tortious interference with prospective economic advantage and retaliatory discharge.<sup>206</sup> Holding the matter governed by Illinois law, the Seventh Circuit held that the plaintiff had failed to allege any reasonable expectation of a future business relationship, and thus failed to state a claim for tortious interference.<sup>207</sup> The pilot had merely alleged that he wished to continue working as a commercial airline pilot—he did not claim that he had been offered a job by any other airline or even that he had interviewed for other positions which had been denied him.<sup>208</sup> With respect to the retaliatory discharge

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<sup>199</sup> See *id.* at 123.

<sup>200</sup> See *id.* at 123.

<sup>201</sup> *Pittman v. Grayson*, 149 F.3d 111, 123 (2d Cir. 1998).

<sup>202</sup> 153 F.3d 622 (8th Cir. 1998).

<sup>203</sup> *Id.* at 626.

<sup>204</sup> *Id.*

<sup>205</sup> 144 F.3d 500 (7th Cir. 1998).

<sup>206</sup> *Id.* at 502.

<sup>207</sup> See *id.* at 502-503.

<sup>208</sup> See *id.* at 503.

cause, the court held that the plaintiff had stated a claim based on the allegation that he had been discharged for "going public" with concerns about the safety of an aircraft operated by his employer.<sup>209</sup>

In *Drake v. Delta Air Lines, Inc.*,<sup>210</sup> the Second Circuit, addressing a former flight attendant's claims for alleged violations of FAA drug testing regulations and of the Fourth Amendment, held that there is no private right of action for violations of such regulations and that as an at-will employee of a private company the flight attendant could not maintain state, common law, or procedural due process claims based on alleged wrongful termination.<sup>211</sup> The court did, however, allow a Fourth Amendment claim to stand based on the allegation that the airline's FAA regulatory drug testing was not randomly administered as constitutionally required absent grounds for reasonable suspicion of drug use.<sup>212</sup>

*Moritz v. Frontier Airlines, Inc.*<sup>213</sup> held that a plaintiff airline employee "station agent" who suffered from multiple sclerosis could not recover under the Americans with Disabilities Act<sup>214</sup> because she had not made the necessary *prima facie* showing that she was "qualified," i.e., that she could perform the essential functions of her work with or without reasonable accommodation.<sup>215</sup> The evidence included admissions that the employee could not assist passengers without help of her own, nor could she perform other gate-related duties that involved ambulating.<sup>216</sup>

A similar result was reached in *Witter v. Delta Air Lines, Inc.*<sup>217</sup> In *Witter*, the plaintiff, a commercial airline pilot, sued his employer and its medical consultants under the Americans with Disabilities Act, the Age Discrimination in Employment Act,<sup>218</sup> and state tort law.<sup>219</sup> Because the employer did not regard the

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<sup>209</sup> See *id.* at 505 ("No Illinois court has held that an employee forfeits his cause of action for retaliatory discharge by complaining publicly rather than privately, and this court will not take that step today." *Id.*).

<sup>210</sup> 147 F.3d 169 (2d Cir. 1998).

<sup>211</sup> *Id.* at 170-71.

<sup>212</sup> See *id.* at 171-72.

<sup>213</sup> 147 F.3d 784 (8th Cir. 1998).

<sup>214</sup> 42 U.S.C. §§ 12101-12213 (1994).

<sup>215</sup> 147 F.3d at 786-88.

<sup>216</sup> See *id.* at 787.

<sup>217</sup> 138 F.3d 1366 (11th Cir. 1998).

<sup>218</sup> 29 U.S.C. §§ 621-634 (1994).

<sup>219</sup> 138 F.3d at 1367.

pilot as restricted in his ability to perform a "class of jobs" due to his alleged inability to fly because of mental or emotional problems originating with a threat to commit suicide (he was still deemed able to do jobs in a class other than piloting), the district court's grant of summary judgment was affirmed.<sup>220</sup>

## V. LIABILITY OF MANUFACTURERS AND SUPPLIERS

### A. LIABILITY TO THIRD PARTIES

In *Emory v. McDonnell Douglas Corp.*,<sup>221</sup> a widower sued the manufacturer of a Navy jet fighter which had crashed and slid into the decedent's vehicle, killing her.<sup>222</sup> The district court entered summary judgment for the manufacturer on the basis that it had no duty to warn of the dangers associated with the jet under Maryland law given the Navy's involvement in its design, and that the manufacturer also had no duty toward any particular pilot.<sup>223</sup> In affirming the district court's grant of summary judgment, the Fourth Circuit found, *inter alia*, that under Maryland law a manufacturer has no duty to warn of an open and obvious danger.<sup>224</sup> A manufacturer also does not have a duty to warn under Maryland law "if the hazard is one which the plaintiff or other user has equal knowledge . . . The duty to warn extends only to those who can reasonably be assumed to be ignorant of the danger."<sup>225</sup>

The court then held that the Navy could not reasonably be assumed to be ignorant of the dangers associated with one of its fighters which crashed after its flight control system failed.<sup>226</sup> The court noted that the Navy played a significant and instrumental role in the design and production of the jet and had specific knowledge of possible flight control system failures and of related precautions and responses.<sup>227</sup> Moreover, the Navy's actual knowledge (or lack thereof) of specific dangers relating to the aircraft was irrelevant to the manufacturer's duty to warn where the Navy so extensively participated in the design and de-

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<sup>220</sup> See *id.* at 1370.

<sup>221</sup> 148 F.3d 347 (4th Cir. 1998).

<sup>222</sup> *Id.* at 348.

<sup>223</sup> See *id.* at 349, 352-53.

<sup>224</sup> See *id.* at 350.

<sup>225</sup> *Id.* at 350 (quoting *Mazda Motor of Am., Inc. v. Rogowski*, 659 A.2d 391, 395 (1995)).

<sup>226</sup> See *id.* at 351-52.

<sup>227</sup> See *id.* at 351.



velopment of the jet.<sup>228</sup> Finally, the Fourth Circuit held that the plaintiff could not maintain a claim against the aircraft manufacturer for failure to warn particular pilots about the allegedly unsafe condition of the aircraft.<sup>229</sup> Agreeing with the district court, the court noted that “nothing in the case law suggests that a military contractor is responsible for directly warning the individual military personnel who fly the planes under military command.”<sup>230</sup>

#### B. GOVERNMENT CONTRACTOR DEFENSE

In *Tate v. Boeing Helicopters*,<sup>231</sup> the court affirmed a summary judgment entered for the defendant helicopter manufacturer based on the “government contractor” defense.<sup>232</sup> In reaching its conclusion, the Sixth Circuit found that the defense would apply to a failure to warn claim related to a helicopter’s tandem hook system, based on evidence that the government exercised its discretion in approving warnings and was generally informed about risks which may have contributed to the involved crash.<sup>233</sup> The court held that a defendant asserting the “government contractor” defense to a failure to warn claim need not establish that the government review process relating to warnings specifically addressed the particular hazard which occurred.<sup>234</sup>

The first condition [to the application of the rule] requires only that the government exercise its discretion in approving the proposed warnings. In the failure to warn context, discretion occurs where the government is both knowledgeable and concerned about the contents of the proposed warnings before granting its approval. The government is sufficiently knowledgeable when it has a complete enough understanding of the proposed warnings

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<sup>228</sup> See *id.* at 352.

<sup>229</sup> See *id.*

<sup>230</sup> *Id.* at 352 (noting that since the Navy possessed the same knowledge as its contractor, a requirement that the contractor provide additional warnings to individual pilots risks disruption of the chain of Naval command: “[w]hether or how those warnings are conveyed to individual Naval officers under military command seems beyond the scope of any duty appropriate to impose on the contractor.” *Id.*); see also *Lurzer v. AlliedSignal, Inc.*, No. 96 C 3845, 1998 WL 102637, \*3-6 (N.D. Ill. Feb. 27, 1998) (granting judgment on the pleadings to the manufacturer of an aircraft engine turbocharger in an action arising from an engine failure during a flight over France for the plaintiff’s failure to state a claim, on limitations grounds, under the “economic loss rule,” and for lack of privity).

<sup>231</sup> 140 F.3d 654 (6th Cir. 1998).

<sup>232</sup> See *id.* at 657-61.

<sup>233</sup> See *id.* at 657-58.

<sup>234</sup> See *id.* at 658.

to reasonably recognize which hazards have been thoroughly addressed and which have not. The government is sufficiently concerned when it demonstrates a willingness to remedy or require the remedy of any inadequacies it finds in the proposed warnings. Where government knowledge and concern are exhibited through the review process, it may be fairly said that the government has decided which warnings should and should not be provided to end users . . . . The second condition [for application of the rule] requires only that the contractor provide warnings which conform to warnings approved by the government.<sup>235</sup>

Finally, the court held that the manufacturer had satisfied the third prong for "government contractor" insulation in the failure to warn arena by showing that it had "warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not."<sup>236</sup>

### C. ECONOMIC LOSS DOCTRINE

The Third Circuit in *Sea-Land Service, Inc. v. General Electrical Co.*<sup>237</sup> evaluated the Supreme Court's decision in *Saratoga Fishing Co. v. J.M. Martinac & Co.*<sup>238</sup> as it relates to the "other property" exception to the "economic loss rule." In *Sea-Land Service, Inc.*, a vessel owner brought tort claims against the manufacturer of a diesel engine that included a replacement part (a rod) that was defectively manufactured, failed, and caused damage to the engine and lost profits while the ship was inoperable.<sup>239</sup> The court held that the engine, rather than the rod, was the "product" for purposes of the "economic loss rule," and that therefore the vessel owner's negligence and strict liability claims for damage to the engine were barred, including damages for loss of use of the vessel:

The law is clear that if a commercial party purchases all of the components at one time, regardless of who assembles them, they are integrated into one product . . . . Since all commercial parties are aware that replacement parts will be necessary, the inte-

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<sup>235</sup> *Id.* at 658-59 (citing *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) (finding that a manufacturer's manual approved by the Government was identical to the manual actually provided to the flight crew of the crashed aircraft)).

<sup>236</sup> *Tate*, 140 F.3d at 660 (citing *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995)).

<sup>237</sup> 134 F.3d 149 (3d Cir. 1998).

<sup>238</sup> 117 S. Ct. 1783, 1785-87 (1997).

<sup>239</sup> 134 F.3d at 151.

grated product should encompass those replacement parts when they are installed in the engine.<sup>240</sup>

Thus the owner's tort claims were barred; however, the court held that "[f]or purposes of contract law, and consequently a breach of warranty claim, Sea-Land is correct—the engine and the rod are separate property, each subject to the terms of its respective contract."<sup>241</sup>

The *Sea-Land* court also addressed the question of whether Sea-Land could state a negligence claim against the engine manufacturer on the basis of either an alleged post-sale duty to warn of a defective product, or allegedly negligent repair of the previously damaged engine.<sup>242</sup> The court essentially held that Sea-Land could have contracted with the manufacturer and thus allocated any such tort risks "or [could] protect against a defect through insurance," and thus denied both claims on the basis of the "economic loss rule."<sup>243</sup> The court did not disturb the general rule that if the damage resulting from a defect is "other than mere economic loss," then "all tort-based theories of recovery including . . . duty to warn" remain viable.<sup>244</sup>

The Seventh Circuit held in *Rodman Industries, Inc. v. G & S Mill, Inc.*<sup>245</sup> that a boiler purchaser's negligence action against a retrofitter of the boiler was barred by the "economic loss rule."<sup>246</sup> The court held that "the main thrust of the deal was the purchase of a retrofitted boiler" and thus rejected the purchaser's claim that the "economic loss rule" would not apply to an alleged services contracts.<sup>247</sup> The court also rejected the purchaser's "other property" argument, holding that damage to the retrofitted boiler was essentially the same as the damage to the original boiler, such that the original boiler could not constitute "other property" separate from the retrofitted boiler.<sup>248</sup>

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<sup>240</sup> *Id.* at 154 (citing *Saratoga Fishing*, 117 S. Ct. at 1785-88 and *Exxon Shipping Co. v. Pacific Resources, Inc.*, 835 F. Supp. 1195, 1201 (D. Haw. 1993)).

<sup>241</sup> *Sea-Land Serv., Inc.*, 134 F.3d at 154.

<sup>242</sup> *See id.* at 155-56.

<sup>243</sup> *Id.* at 154-56.

<sup>244</sup> *See id.* at 155 (rejecting *McConnell v. Caterpillar Tractor Co.*, 646 F. Supp. 1520, 1523-26 (D.N.J. 1986)).

<sup>245</sup> 145 F.3d 940 (7th Cir. 1998).

<sup>246</sup> *Id.* at 943-45.

<sup>247</sup> *Id.* at 943 (noting the unsettled nature of Wisconsin law on the issue).

<sup>248</sup> *See id.* at 945. *But see* *Transco Syndicate #1, Ltd. v. Bollinger Shipyards, Inc.*, 1 F. Supp. 2d 608, 611-13 (E.D. La. 1998) (holding that a replacement engine was a product separate from a vessel).

## VI. LIABILITY OF THE UNITED STATES

## A. FEDERAL TORT CLAIMS ACT

1. *Air Traffic Control Liability*

In *Jackson v. United States*,<sup>249</sup> the court addressed a Federal Tort Claims Act (FTCA)<sup>250</sup> suit involving allegedly insufficient weather information given to the pilot of a small plane by FAA personnel. The pilot was killed when his plane crashed near Charleston, West Virginia.<sup>251</sup> The First Circuit held that the FAA's decision regarding the dissemination of weather information likely involved a "discretionary function," and that in all events it had not been negligent and the pilot maintained primary responsibility for weather briefing and his related flight planning.<sup>252</sup>

2. *FTCA General Issues*

In *Bailey v. Illinois Freedom Militia Southern Zone*,<sup>253</sup> the court denied relief sought by a petition for writ of mandamus and summarily affirmed in an alleged Federal Tort Claims Act case.<sup>254</sup> The court held that the underlying allegations amounted to no more than a claim that the Government had improperly performed a civil rights investigation, which was a wholly discretionary act for which the Government was immune from suit.<sup>255</sup>

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<sup>249</sup> 156 F.3d 230 (1st Cir. 1998).

<sup>250</sup> 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2671-2680 (1994).

<sup>251</sup> See *Jackson*, 156 F.3d at 232.

<sup>252</sup> See *id.* at 234-35; see also *Management Activities, Inc. v. United States*, 21 F. Supp. 2d 1157, 1162-67 (C.D. Cal. 1998) (holding that claims against the FAA and air traffic controllers for wrongful deaths arising from a wake turbulence accident were barred by the FTCA's "discretionary function" exception on the basis that the prioritization of aviation risks is a matter of agency policy; also holding that although not immune from suit, the controllers were not negligent in failing to warn regarding wake turbulence because under VFR conditions pilots, not controllers, bear primary responsibility to avoid wake turbulence hazards). But see *Barna v. United States*, 22 F. Supp.2d 784, 785-87 (N.D. Ill. 1998) (denying application of the "discretionary function" exception to the FTCA in a general aviation crash case where an issue of fact existed as to whether the Government had considered charting certain trees located at elevation, as required by IACC procedures).

<sup>253</sup> No. 98-5094, 1998 WL 545425, \*1-2 (D.C. Cir. July 17, 1998).

<sup>254</sup> *Id.* at \*1.

<sup>255</sup> See *id.* at \*1 (citing 28 U.S.C. § 2680). But see *Merritt v. Shuttle, Inc.*, 13 F. Supp. 2d 371, 379-381 (E.D.N.Y. 1998) (holding a plaintiff's claim that FAA inspectors had conspired to place blame on him for an aviation incident, resulting in suspension of his license, did not involve judgment on the part of the inspec-

In *Kasim v. Republic Management Services, Inc.*,<sup>256</sup> the Ninth Circuit affirmed a district court grant of summary judgment to the United States on a personal injury claim arising from a trip and fall in a Department of Housing and Urban Development owned apartment complex.<sup>257</sup> The plaintiff's claims against the United States revolved in part around allegations that it controlled and supervised the acts of the apartment management agency such that the government should be liable for the injury.<sup>258</sup> The court held that while the FTCA amounts to a "limited waiver of sovereign immunity and makes the United States liable for money damages 'caused by the negligent or wrongful act or omission of any employee of the Government,'"<sup>259</sup> it does not provide a waiver of immunity with respect to the torts of independent contractors working for the United States.<sup>260</sup> The court found that "the government's establishment of detailed regulations, its ability to compel [its agent's] compliance with [those] standards, and its periodic inspections [of the agent, were] insufficient to" deny the United States summary judgment.<sup>261</sup>

In *White v. United States*,<sup>262</sup> the Fifth Circuit reversed a district court's decision denying the United States' motion for a stay of a Federal Tort Claims Act suit and the district court's entry of judgment for the plaintiff-employee of the Department of the Army. The appellate court found that a substantial question existed as to whether the Secretary of Labor would find that the employee's claim was covered by the Federal Employers Compensation Act (FECA),<sup>263</sup> thus requiring the district court to have stayed proceedings pending the determination of that issue by the Secretary:

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tors so that the "discretionary function" exception to the FTCA might provide a liability shield; also holding that libel and slander claims were barred by 28 U.S.C. § 2680(h) because the Government has not waived its sovereign immunity for such claims).

<sup>256</sup> 141 F.3d 1176, No. 97-15048, 15430, 1998 WL 166540, \*1-2 (9th Cir. Mar. 31, 1998).

<sup>257</sup> *Id.* at \*1-2.

<sup>258</sup> *See id.* at 1.

<sup>259</sup> *See* 28 U.S.C. § 1346(b) (1994).

<sup>260</sup> *See Kasim*, 1998 WL 166540, at \*1 (citing 28 U.S.C. § 2671).

<sup>261</sup> *See id.* at \*2 (citing *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983) and *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987)).

<sup>262</sup> 143 F.3d 232 (5th Cir. 1998).

<sup>263</sup> 5 U.S.C. § 8102(a) (1994).

If, after remand, White presents his claim to the Secretary, and the Secretary determines that FECA provides White's remedy, then White must pursue the claim accordingly. If, however, the Secretary finds no FECA coverage, White will be able to pursue his claim under the FTCA in which case the district court is free to reinstate the judgment.<sup>264</sup>

## B. REGULATORY CHALLENGES

### 1. Rulemaking and Findings Challenges

In *Asiana Airlines v. Federal Aviation Administration*,<sup>265</sup> the court held that under the Federal Aviation Reauthorization Act<sup>266</sup> the FAA was not required to conform to Administrative Procedure Act<sup>267</sup> notice and comment procedures in implementing fees for services provided to airline flights neither taking off nor landing in the United States.<sup>268</sup> The court further held the FAA also did not violate any international aviation agreements when it promulgated the interim final rule without a notice and comment period because the alleged agreements did not themselves provide for such periods, and the FAA held meetings with foreign carriers before promulgating the rule in all events.<sup>269</sup> Additionally, the court found that the rule also did not violate such international agreements by discriminating against foreign carriers.<sup>270</sup> Finally, the court found that the statute under which the rule had been promulgated allowed the FAA to charge for in-flight services provided to airline overflights regardless of whether their flight paths took them over the United States (as opposed to in its airspace), but that the agency exceeded its authority when it based such fees, in part, on the value to the user of the services instead of on the costs of providing them as required by law.<sup>271</sup>

In *Grand Canyon Air Tour Coalition v. Federal Aviation Administration*,<sup>272</sup> the court rejected attacks by air tour operators, Clark County Nevada, a Native American tribe, and several environmental groups to the FAA's 1996 final rule restricting overflights

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<sup>264</sup> *White*, 143 F.3d at 239.

<sup>265</sup> 134 F.3d 393 (D.C. Cir. 1998).

<sup>266</sup> 49 U.S.C. § 45301 (1994).

<sup>267</sup> 5 U.S.C. § 553 (1994).

<sup>268</sup> See *Asiana Airlines*, 134 F.3d at 398-99.

<sup>269</sup> See *id.* at 399.

<sup>270</sup> See *id.*

<sup>271</sup> See *id.* at 400-03.

<sup>272</sup> 154 F.3d 455 (D.C. Cir. 1998).

at Grand Canyon National Park.<sup>273</sup> Tour operators claimed that the rule failed to meet a federal statutory mandate to protect the park's environment because it relied on acoustical measurements rather than visitor surveys to define "natural quiet."<sup>274</sup> The court found that the agency's definition and interpretation of the term were reasonable and did not lead to an overly restrictive regulation.<sup>275</sup> Similarly, statutory language requiring the FAA to create flight-free areas within the park did not require the agency to create completely noise-free areas, as argued by the environmental groups.<sup>276</sup> Finally, the court held that the final rule also did not violate federal administrative procedure requirements. Because the FAA was statutorily bound to accept related Interior Secretary recommendations unless aviation safety was adversely affected, the agency was not required to consider tour operators' comments or to respond to them.<sup>277</sup> In sum, the court upheld the FAA's 1996 final ruling restricting overflights in the park.

In *Air Canada v. Department of Transportation*,<sup>278</sup> the court held under the Airports and Airways Improvement Act<sup>279</sup> that several carriers' petitions for review of agency orders issued by DOT should be denied because the agency had not acted unreasonably or inconsistently in finding that airport facilities to be built in Miami and used primarily by one hub tenant were "comparable" to those available to the complaining carriers, or when it conditioned its finding that fees charged by the county in connection with the renovations were reasonable on the county's consistent application of its equalization methodology.<sup>280</sup> The complaining carriers' argued, in essence, that county-imposed improvement fees amounted to an unfair subsidy to the hub tenant. After stating that its review of agency action was limited to an assessment for arbitrariness, capriciousness, or abuse of discretion, the court held that the DOT's findings as to comparability of facilities and its condition that the county assess fees based on the consistent application of its equalization methodology once final costs were ascertained, were not unreasonable

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<sup>273</sup> *Id.* at 459-60.

<sup>274</sup> *See id.* at 466.

<sup>275</sup> *See id.* at 465-67.

<sup>276</sup> *See id.* at 474.

<sup>277</sup> *See id.* at 467-68.

<sup>278</sup> 148 F.3d 1142 (D.C. Cir. 1998).

<sup>279</sup> 49 U.S.C. § 47107 (1994).

<sup>280</sup> 148 F.3d at 1153.

and thus were not subject to review.<sup>281</sup> The court also found that imposing on the carriers the burden to show that the DOT's action was unreasonable had not been unfair given that the administrative proceedings were essentially a continuation of a suit instituted by the carriers who had not shown prejudice by virtue of the assignment of the burden.<sup>282</sup>

In *City of Los Angeles v. Federal Aviation Administration*,<sup>283</sup> the court affirmed an FAA decision approving the Burbank-Glendale-Pasadena Airport Authority's plan to expand and modernize its terminal and related facilities, rebuking a challenge to the agency's environmental impact statement.<sup>284</sup> The Ninth Circuit found that the FAA had taken the requisite "hard look" at the environmental effects of the project as required under the National Environmental Policy Act<sup>285</sup> and the California Environmental Quality Act,<sup>286</sup> and that the project was also "grandfathered" under Clean Air Act<sup>287</sup> legislation prohibiting agencies from supporting projects that do not conform to a state's environmental implementation plan.<sup>288</sup> The court noted that in the environmental review arena, the function of the court is not to agree or disagree with the agency's conclusions but rather to ensure that true environmental review had occurred.<sup>289</sup>

## 2. *Certificate Proceedings*

In *Aerosource, Inc. v. Slater*,<sup>290</sup> the court, addressing an issue of first impression, held that there was no appellate jurisdiction to review the FAA's actions in issuing advisories regarding safety concerns about repair work performed by a repair station.<sup>291</sup> The court found that the FAA advisories in question were not final agency orders, and hence were not appealable, that an

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<sup>281</sup> See *id.* at 1151-53.

<sup>282</sup> See *id.* at 1155-56.

<sup>283</sup> 138 F.3d 806 (9th Cir. 1998).

<sup>284</sup> *Id.* at 807-09.

<sup>285</sup> 42 U.S.C. § 4332 (1994).

<sup>286</sup> CAL. PUB. RES. CODE § 21100 (West 1996 & Supp. 1999).

<sup>287</sup> 42 U.S.C. § 7506(c) (1994).

<sup>288</sup> See *City of Los Angeles*, 138 F.3d at 808-09.

<sup>289</sup> See *id.* at 807. But see *Chicago Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611, at \*2-3 (N.D. Ill. May 7, 1998) (granting plaintiff's motion for summary judgment under the Freedom of Information Act compelling the FAA to produce documents concerning in-flight medical emergencies on commercial airlines).

<sup>290</sup> 142 F.3d 572 (3rd Cir. 1998).

<sup>291</sup> *Id.* at 576-81.



agency letter to the repair station denying the latter's request to rescind the advisories also was not a final agency action and as such also was unappealable, and that the agency's refusal to reconsider the rescission request denial also was not final or appealable.<sup>292</sup> The court's analysis of the lack of finality turned on the fact that neither the advisories nor the other agency actions were matters as to which "the agency has completed its decision making process, . . . [which] is one that will directly affect the parties."<sup>293</sup> In this case, the FAA's actions and conclusions were tentative and indicative of an ongoing investigation.<sup>294</sup> They also imposed no obligations, denied no rights, nor fixed or altered any legal relationships.<sup>295</sup>

In *Crist v. Leippe*,<sup>296</sup> the Ninth Circuit affirmed a district court's judgment dismissing a case brought by a pilot whose commercial certificate was suspended by the FAA which asserted constitutional tort claims based on the agency's alleged spoliation of evidence.<sup>297</sup> After removal of the action by the FAA, the district court had dismissed the case for lack of subject matter jurisdiction.<sup>298</sup> The Ninth Circuit found the dismissal erroneous, but also held that the pilot could not state a claim upon which relief could be granted, and thus affirmed.<sup>299</sup> The court held that the administrative proceeding underlying the claim, which had found that the pilot had suffered no cognizable injury, was in essence a bar to review in the district court.<sup>300</sup>

In *Kraley v. National Transportation Safety Board*,<sup>301</sup> the court denied mandamus relief to a pilot whose commercial certificate suspension by the FAA pursuant to 14 C.F.R. § 61.15 (relating to repeat motor vehicle actions involving drugs or alcohol) had been upheld by the NTSB.<sup>302</sup> In denying relief, the Sixth Circuit found, *inter alia*, that the involved regulation did not impose arbitrary standards nor was it based on arbitrary findings or violative of due process, and that the FAA did not exceed its

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<sup>292</sup> See *id.*

<sup>293</sup> *Id.* at 578 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)).

<sup>294</sup> See *id.* at 579-80.

<sup>295</sup> See *id.* at 580-81.

<sup>296</sup> 138 F.3d 801 (9th Cir. 1998).

<sup>297</sup> *Id.* at 802-03.

<sup>298</sup> See *id.* at 803.

<sup>299</sup> See *id.* at 804-05.

<sup>300</sup> See *id.* at 805.

<sup>301</sup> 165 F.3d 27, No. 97-4227, 1998 WL 708705, \*2-7 (6th Cir. Oct. 1, 1998).

<sup>302</sup> *Id.* at \*1.

jurisdiction in sanctioning airmen for the violation of motor vehicle laws.<sup>303</sup>

## VII. INSURANCE

### A. QUALIFICATION OF PILOTS

In *Brown v. North American Specialty Insurance Co.*,<sup>304</sup> the Georgia Court of Appeals reversed a summary judgment granted to a hull insurer which had denied coverage for loss of an aircraft because the pilot was not licensed or qualified to fly it in IFR weather conditions prevailing during the flight.<sup>305</sup> The policy exclusion at issue provided that the pilot of the insured aircraft must be "licensed and qualified under federal . . . laws and regulations for all segments of the flight involved."<sup>306</sup> The court rejected the insurer's argument that this language excluded coverage if the pilot operated the aircraft in IFR weather conditions during any segment of the flight, and instead found that the exclusion was unclear and required construction as it applied to the pilot's decision to operate the aircraft in IFR weather conditions prevailing at his chosen landing site.<sup>307</sup>

In the court's opinion, issues of fact remained as to whether the pilot could have reasonably expected that the aircraft would remain insured while he operated it in IFR conditions while attempting to land, if he did so only to the extent required to meet an in-flight emergency which could not have been reasonably avoided by compliance with FAA regulations.<sup>308</sup> It held that a jury could conclude that, based on pre-flight weather briefings, the pilot reasonably expected he would encounter VFR weather conditions upon his arrival at his destination; that he only unexpectedly encountered IFR weather conditions in the area; that he had no reasonable alternative but to attempt to land at the chosen airport; and that, considering all the relevant facts, the attempted IFR landing constituted an unavoidable in-flight emergency that would allow aircraft operation in IFR conditions without an instrument rating.<sup>309</sup>

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<sup>303</sup> See *id.* at \* 2-3.

<sup>304</sup> 508 S.E. 2d 741 (Ga. App. 1998).

<sup>305</sup> *Id.* at 742.

<sup>306</sup> *Id.* at 742-43.

<sup>307</sup> See *id.* at 744-45.

<sup>308</sup> See *id.* at 746 (noting a pilot-in-command's regulatory authority to deviate during an in-flight emergency).

<sup>309</sup> See *id.*

## B. SCOPE OF COVERAGE

In *Avemco Insurance Co. v. Davenport*,<sup>310</sup> the Ninth Circuit affirmed a judgment holding that under California law an aircraft liability insurance policy's exclusion of losses occurring when the insured aircraft is modified but not certified by the FAA, applied to a change in the design of an aircraft fuel system.<sup>311</sup> The appellant in *Avemco Insurance Co.* had built an airplane and obtained FAA certification of airworthiness.<sup>312</sup> The certification was conditioned on various operating limitations, one of which was notification to the FAA in the event of any "major change" as defined by federal regulation.<sup>313</sup> The applicable regulation defined "major change" to include any change having an appreciable effect on the "reliability, operational characteristics, or other characteristics affecting the airworthiness of the [aircraft]." <sup>314</sup> The appellant had made a series of changes in the fuel system without notifying the FAA or obtaining recertification. The accident occurred after the last of the changes.<sup>315</sup>

The court held that altering the method of delivering fuel to the engine had an obvious and substantial effect on reliability, operational characteristics or other characteristics affecting airworthiness.<sup>316</sup> The court found that each of the changes had been major, that the policy exclusion was clear, and that California courts do not find ambiguity in exclusions that summarily incorporate FAA requirements by reference.<sup>317</sup> Finally, the court found that no duty to defend claims against the appellant brought by other persons arising from the crash existed either—noting that no duty to defend arises if the undisputed facts establish that the insured is not entitled to coverage.<sup>318</sup>

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<sup>310</sup> 140 F.3d 839 (9th Cir. 1998).

<sup>311</sup> *Id.* at 842-43.

<sup>312</sup> *Id.* at 841.

<sup>313</sup> *See id.*

<sup>314</sup> *Id.* at 842.

<sup>315</sup> *See Avemco Insurance Co.*, 140 F.3d at 841-42.

<sup>316</sup> *See id.* at 842-43.

<sup>317</sup> *See id.* at 843.

<sup>318</sup> *See id.* at 843 (citing *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1159 (1993)). *But see Anderson v. Virginia Surety Co., Inc.*, 985 F. Supp. 182, 186-92 (D. Me. 1998) (holding on summary judgment that an aircraft insurer had a duty to defend its insured in a wrongful death action charging the insured's negligence in the death of a customer attending an introductory parachuting course; also finding a violation of unfair claims practices statutes by the insurer's having waited 11 months before indicating its refusal to defend or indemnify).